

**Temp Tech Industries, Inc. and Glaziers' Union  
Local No. 27, International Brotherhood of  
Painters and Allied Trades, AFL-CIO. Case  
13-CA-21057(E)**

May 4, 1983

**SUPPLEMENTAL DECISION AND  
ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
JENKINS AND HUNTER**

On December 10, 1982, Administrative Law Judge Claude R. Wolfe issued the attached Supplemental Decision in this proceeding. Thereafter, the Applicant, Temp Tech Industries, Inc., filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

It is hereby ordered that the application of the Applicant, Temp Tech Industries, Inc., Chicago, Illinois, for an award under the Equal Access to Justice Act be, and it hereby is, dismissed.

**SUPPLEMENTAL DECISION**

CLAUDE R. WOLFE, Administrative Law Judge: On June 14, 1982, I issued a Decision in this proceeding finding violations of Section 8(a)(5) and (1) of the Act, but dismissing allegations that (1) Bernard Szkolny was unlawfully discharged; (2) Respondent had failed to designate a negotiator with sufficient authority; and (3) Respondent's president, Semeraro, had solicited grievances from, and offered to negotiate individual contracts with, employees for the purpose of discouraging their participation in a strike.<sup>1</sup> No exceptions were filed with the Board, and, on July 27, 1982, the Board issued its Order adopting my findings and conclusions and ordering Respondent to take the action set forth in my recommended Order.

On August 26, 1982,<sup>2</sup> Temp Tech Industries, Inc., herein called Applicant, filed an application for award of

<sup>1</sup> General Counsel's post-trial motion to withdraw item (3) on the ground of insufficient evidence was granted.

<sup>2</sup> Although the Board's Order of August 30, 1982, referring the application and motion to me for appropriate action recites the filing date as August 27, the General Counsel and Respondent agree the application and motion were in fact filed with the Board in Washington, D.C., on August 26.

attorney's fees under the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325, and Section 102.143 of the Board Rules and Regulations, together with a motion not to disclose "Confidential Financial Information" filed with the application. The General Counsel filed no opposition to the motion not to disclose, and it is therefore granted.

Applicant contends that the issuance of the complaint on all matters subsequently dismissed by the Administrative Law Judge, and the position of the General Counsel in refusing to settle and then litigating matters on which Applicant ultimately prevailed, were without substantial justification. In addition to the three complaint allegations mentioned above as specifically dismissed, Applicant contends that it also prevailed on an allegation that it "engaged in dilatory tactics by cancelling or prematurely ending various bargaining sessions without cause" because no separate finding of a refusal to bargain by this conduct was made in my Decision.

The General Counsel filed a motion to dismiss the application on September 10, 1982, on grounds of untimely filing, failure of Applicant to prevail "in a significant and discrete substantive portion" of the adversary proceeding, substantial justification for the General Counsel's position in the adversary proceeding, and deficiency of the application in failing to set forth the categories of Applicant's employees, and to specifically itemize the expenses claimed.

Applicant replied to the motion to dismiss by relating facts indicating the application was timely filed, and again asserting that Applicant was a prevailing party in regard to discrete and substantive portions of the complaint upon which the General Counsel had no substantially justifiable litigation position. With respect to the sufficiency of the application, Applicant contends it is sufficient under the controlling rules, and promises to forthwith provide more specific itemization if directed or requested to so do.

Inasmuch as the General Counsel now concedes that the application was timely filed, and moves to withdraw his contention to the contrary, the portion of his motion alleging untimely filing is denied. The contention that the application may be technically deficient in certain particulars is insufficient to support a motion because any such deficiency can be readily remedied by amendment which Applicant has offered to do.

The Decision in this case set forth that Applicant attended bargaining meetings without clearing its calendar of conflicting appointments or giving the Union prior notice, asked to be and was excused from two meetings to attend to other business, and canceled one meeting because of a conflicting engagement. These findings, which were factors considered in reaching the ultimate conclusion that Applicant violated Section 8(a)(5) and (1) of the Act by deliberately delaying, confusing, and obstructing meaningful bargaining, none of which was excepted to by Applicant, show that Applicant did not prevail on the issue of cancelling or prematurely ending bargaining sessions.

When a respondent in an adversary proceeding prevails only in part any recoverable fees and expenses must

be incurred in connection with a "significant and discrete substantive portion of that proceeding."<sup>3</sup> That Applicant failed to appoint a negotiator with sufficient authority was alleged, litigated, and argued by the General Counsel as one facet of Applicant's conduct which, when added to other evidence, warranted a finding that Applicant did not bargain in good faith. Applicant's entire course of bargaining conduct was at issue before me, and all conduct of the parties to the negotiations was presented in considerable detail. The evidence that the General Counsel urged as proof of the failure to appoint a negotiator with sufficient authority was adduced as part of that detail, and would have been on the record, whether specifically alleged or not, as part of the bargaining continuum. The inclusion of this allegation in the complaint required no preparation or litigation expense additional to that which would have been required without it, and I am persuaded that the degree of the negotiator's authority was not a significant portion of the proceeding. Moreover, as the General Counsel argued in his post-trial brief, Applicant's sole representative throughout the 19 bargaining sessions, except for 2, was its attorney even though the Union repeatedly requested the presence of a management official to assist in expediting negotiations, and the General Counsel presented some authority for the proposition that failure to have a knowledgeable management representative present is bad-faith bargaining.<sup>4</sup> Accordingly, I further find from the record, including the post-trial briefs, the General Counsel's position on this matter was reasonable in fact and law, and therefore substantially justified.

Applicant's president was alleged to have violated the Act during a meeting with his employees on or about April 29, 1981, by, in substance, (1) soliciting grievances and offering to negotiate individual employment contracts, and (2) stating negotiations would halt if the employees struck. Item (1) was withdrawn by the General Counsel in his post-trial brief, and item (2) was found to

have merit. Both allegations were based on events in a single meeting. It is difficult to believe that the costs of litigation were significantly increased, if at all, by the allegations of two violations rather than one during this meeting, and it is concluded that item (1) was not a significant portion of the proceeding, and its litigation did not increase Applicant's costs.

The discharge of Bernard Szkolny was the only matter in the complaint alleged to be a violation of Section 8(a)(3), and was clearly a significant and discrete portion of the adversary proceeding. This allegation was dismissed after I discredited Szkolny and drew inferences adverse to him. Had Szkolny been credited different inferences might well have been drawn leading to a finding that his conduct was not sufficiently flagrant and egregious to warrant the discharge of an unfair labor practice striker. The General Counsel's decision to litigate Szkolny's discharge was, I find, substantially justified in fact and law.

Applicant contends that the Regional Director was without substantial justification in issuing a complaint on matters on which Applicant eventually prevailed, and further contends that the General Counsel was without substantial justification in rejecting a settlement offered by Applicant. Suffice it to say that this proceeding is not designed to test the Regional Director's complaint-issuing discretion or the General Counsel's settlement posture, but is directed at the General Counsel's litigation position on matters resolved in Applicant's favor.

The issues on which Applicant actually or arguably prevailed have been found either insignificant to the proceeding or substantially justified. Accordingly, I find that Temp Tech Industries, Inc., has suffered no expenses of litigation recoverable under the Equal Access to Justice Act, and issue the following:

#### ORDER

The General Counsel's motion to dismiss is granted, and the application of Temp Tech Industries, Inc., for an award under the Equal Access to Justice Act is denied.

<sup>3</sup> Sec. 102.144(a) of the Board's Rules and Regulations.

<sup>4</sup> *O & F Machine Products Co.*, 239 NLRB 1013, 1019 (1978).